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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/563,587	04/18/2006	Jean Krutmann	7290-106	3294
62836	7590	08/05/2008	EXAMINER	
BERLINER & ASSOCIATES 555 WEST FIFTH STREET 31ST STREET LOS ANGELES, CA 90013			SIMMONS, CHRIS E	
ART UNIT	PAPER NUMBER		1612	
MAIL DATE	DELIVERY MODE			
08/05/2008	PAPER			

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/563,587	<b>Applicant(s)</b> KRUTMANN, JEAN
	<b>Examiner</b> CHRIS E. SIMMONS	<b>Art Unit</b> 1612

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 03 April 2008.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1,2,5,6,9 and 10 is/are pending in the application.
  - 4a) Of the above claim(s) 1,2 and 5 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 6,9 and 10 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/146/08)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_

## DETAILED ACTION

### *Election/Restrictions*

Newly amended claims 1, 2 and 5 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

Claims 1 and 5/1 are drawn to a method of treating comprising administering an osmolyte selected from ectoine, hydroxyectoine or a pharmaceutically acceptable salt thereof.

Claims 2 and 5/2 are drawn to a method of production using an osmolyte selected from ectoine, hydroxyectoine or a pharmaceutically acceptable salt thereof.

Claims 6, 9, and 10 are drawn to a device comprising an osmolyte selected from ectoine, hydroxyectoine or a pharmaceutically acceptable salt thereof.

The inventions listed as Groups I-III do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features for the following reasons: The common technical feature is not a special technical feature because it is not the Applicant's contribution over the prior art. The common technical feature is an osmolyte selected from ectoine, hydroxyectoine or a pharmaceutically acceptable salt thereof. US 2003/0054021 (in ¶ 99) and US 2003/0021817 (¶113) – both references are in list of references cited by Examiner submitted on 10/04/2007 - teach the osmolyte, ectoine

and derivatives thereof, as moisturizing compounds that directly increase water content (osmolytes).

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 1, 2, and 5 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

***Oath/Declaration***

The oath or declaration is defective. A new oath or declaration in compliance with 37 CFR 1.67(a) identifying this application by application number and filing date is required. See MPEP §§ 602.01 and 602.02.

The oath or declaration is defective because:

The specification to which the oath or declaration is directed has not been adequately identified. See MPEP § 602.

**This objection is maintained.**

***Specification***

The disclosure is objected to because it contains an embedded hyperlink and/or other form of browser-executable code. Applicant is required to delete the embedded hyperlink and/or other form of browser-executable code. See MPEP § 608.01.

**This objection is maintained.**

Applicant states that there is no need to modify the reference because nothing happens when one tries to click on the hyperlink. This is not persuasive because, whether the link is active or not, when one tries to type the URL into a web browser the information contained on the webpage may be different from the information contained on the webpage at the filing of this application.

***Claim Rejections - 35 USC § 103***

Claims 6-8 were rejected under 35 USC 103(a) as being unpatentable over US Pat. 6,716,819 ('819) in view of US 2003/0054021 ('021) and US 2003/0021817 ('817). This rejection is maintained and is now applicable to newly amended claims 9-10.

**This rejection is maintained.**

Applicant argues that the cited prior art does not disclose any suitability of xylitol in combating the damaging effects of suspended particulate, the references can not teach the use of ectoines for that specific purpose. Applicant further argues that the fact that both xylitol and ectoines belong to the group of osmolytes, does not render the use of ectoines in connection with suspended particulate obvious.

In response to applicant's argument that the references do not teach treatment of diseases caused by suspended particulates, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior

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art. If the prior art structure is capable of performing the intended use, then it meets the claim. Furthermore, since the secondary and primary references disclose that the xylitol and ectoines have similar functions in compositions (i.e., as osmolytes or moisturizers), and more particularly that ectoines are suitable as an osmolyte in a composition, then, it is prima facie obvious to select a known material for incorporation into a composition, based on its recognized suitability for its intended purpose. See MPEP 2144.07.

No claims are allowed.

***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

***Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CHRIS E. SIMMONS whose telephone number is (571)272-9065. The examiner can normally be reached on Monday - Friday from 7:30 - 5:00 PM EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Frederick Krass can be reached on (571) 272-0580. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Chris E Simmons/  
Examiner, Art Unit 1612

***/Frederick Krass/***

**Supervisory Patent Examiner, Art Unit 1612**